Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO *and* Time Warner Cable New York City, LLC. Case 29–CB–125701

October 29, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On April 28, 2015, Administrative Law Judge Steven Fish issued the attached decision. The Charging Party filed exceptions, a supporting brief, and a motion to reopen the record. The Respondent filed an answering brief and an opposition to the Charging Party's motion.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. October 29, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Charging Party moves to reopen the record to admit evidence that, after the hearing, the Respondent filed notices of its intention to arbitrate grievances and "admitted" the existence of a collective-bargaining agreement in arbitral and judicial filings. The Charging Party contends that this evidence demonstrates that the Respondent unlawfully refused to execute an agreed-upon contract. Contrary to the Charging Party's contention, the Respondent's posthearing conduct shows only that the Respondent mistakenly believed that the parties had reached agreement on March 28, 2013. It does not bear on the relevant question of whether the parties reached a meeting of the minds regarding all material terms of their successor contract. Accordingly, we deny the Charging Party's motion, as the evidence sought to be adduced would not require a different result in this case. See Sec. 102.48(d)(1) of the Board's Rules and Regulations.

[2] In adopting the judge's finding that the Respondent did not violate Sec. 8(b)(3) by refusing to execute the successor collective-bargaining agreement, we find it unnecessary to pass on the judge's finding that the Charging Party's inclusion of the Southern Manhattan Rider in the copy of the contract it attached to its Federal district court complaint alleging a violation of the contractual no-strike clause constituted an admission that the Rider was part of the parties' agreement.

Genaira Tyce, Esq. (Region 29) and *Noor I. Alam, Esq (Region 29),* for the General Counsel.

Robert T. McGovern, Esq. (Archer, Byington, Glennon & Levine, LLP), of Melville, New York, for the Respondent.

Daniel Silverman, Esq. (Daniel Silverman, LLP), of Brooklyn, New York, for the Charging Party.

DECISION

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed on March 31, 2014, by Time Warner Cable New York City, LLC (Charging Party or TWC) the Director for Region 29 issued a complaint and notice of hearing, alleging that Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO (Respondent) violated Section 8(b)(3) of the Act by refusing to execute a collective-bargaining agreement agreed upon by the parties.

The trial with respect to the allegations in the complaint was held before me on July 29, 2014, and October 6, 2014, in Brooklyn, New York.

Briefs have been filed by the General Counsel, Respondent, and by Charging Party, and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following:[1]

[1] On October 14, 2014 Burke Reporting Service notified the parties and ALJ's Division, that portions of witness Derek Jordan's testimony on October 1, 2014 was not recorded and not transcribed in the transcript. Subsequently the parties have entered into a stipulation relating to the portions Jordan's testimony that was not transcribed. This stipulation is received into the record as (ALJ's Exh. 1)

Additionally the Charging Party filed a motion to correct the transcript. No objection has been filed to this motion. I hereby grant the motion, and the transcript is hereby corrected as follows:

Page	line	From	To
1 - 10	4	"Moor"	"Noor"
2- 20	22–23	"a new file"	"for review
3- 22	6–8		

FROM

"I have an assistant chief counsel, associate vice president, Greg Drake (ph) who reports to me as senior counsel, Jamal Dokins (ph) and another senior counsel, Heather Ryan."

TO

"I have an Assistant Chief counsel and Vice President, Greg Drake, who reports to me. A Senior Counsel, Jamal Dawkins

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Time Warner Cable is a domestic limited liability company with its corporate office located at 60 Columbus Circle, New York, New York, and places of business located in Bergen County, New Jersey (the Bergen facility), Southern Manhattan, New York (the Southern Manhattan facility), Brooklyn, New York (the Brooklyn facility), Queens, New York (the Queens facility), and Staten Island, New York (the Staten Island facility) collectively as the Tri-State facilities (Charging Party facilities), where it is engaged in providing cable television, telephone, and high speed internet services.

During the preceding 12 months, the Charging Party received revenue in excess of $100,000 and purchased and received at each of the Charging Party's facilities goods, supplies, and utilities valued in excess of $5000 directly from suppliers outside the State of New York.

It is admitted and I so find, that Charging Party has been an employer engaged in commerce within the meaning of Section 2(2) and (6) and (7) of the Act.

It is also admitted and I so find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. COLLECTIVE-BARGAINING HISTORY

Respondent has represented the employees at TWC's Tri-State facilities for a number of years, and has been party to a series of collective-bargaining agreements. The most recent collective-bargaining agreements between TWC and the Union, consisted of separate different bargaining agreements for each facility, which consisted of a Master Agreement and a Rider which set forth some different terms and conditions of employment as it related to specific locations.[2]

All six of these collective-bargaining agreements were effective from April 1, 2009, to March 31, 2013.

On January 3, 2013, a bargaining unit employee at TWC's Bergen facility filed a decertification petition with Region 22 of the Board, in Case 22–RD–095758, seeking to decertify Respondent as the collective-bargaining representative of the Bergen employees employed at TWC.

Thereafter a hearing was conducted at Region 22 with respect to this petition. TWC agreed at the hearing that the petition should proceed and be processed and an election ordered in a unit confined to TWC's Bergen employees. Respondent took the position at the hearing that the most appropriate unit in the decertification context should be a multilocation unit consisting of TWC's six facilities.

The Director on February 13, 2013, issued a Decision agreeing with Respondent's position and finding a multilocation unit of TWC's facilities most appropriate, and dismissed the petition. TWC did not seek review of the Director's Decision. Subsequently Respondent and TWC agreed that the Bergen location and all the other locations would be treated as one single bargaining unit.

The Director's Decision reflected that TWC had voluntarily agreed to recognize a unit of technicians at its Bergen facility. The recognition agreement signed in 2004, specified that the existing CBA's for TWC's New York City Division, would not apply to the Bergen facility, save for the party's collective-bargaining grievance procedure and no strike clause, and that the parties would begin negotiations for a new contract in October of 2005. A January 2006 memorandum of agreement between TWC and Respondent resulted in the adoption of contract language nearly identical to the collective-bargaining agreements that Respondent and TWC had reached in 2005. "The terms of Agreement" clause in the memorandum stated "January 2006–March 31, 2009," which was timed to expire on the same date the CBAs were negotiated between Respondent and TWC covering the New York City Divisions expired. During the term of the Agreement the employees at Bergen were subjected to the terms and conditions of employment equal to those set forth in the collective-bargaining agreement entered into between TWC and Respondent as of March 1, 2005, except as set forth in the MOA. The items agreed in the MOA included preservation of more generous vacations, personal days, floating holidays, and sick time accrual for Bergen employees, different annual wage increases, commencement of TWC contributions to an industry educational and cultural fund, joint industry board and dental plan, delayed employer payment of the employees' share of FICA, amendments for applying course work completion towards journeymen status, exclusive of local origination and security employees from the bargaining unit; addition of certain shift schedules, and definition of stand by procedures.

The Director's Decision also reflected that in 2009 bargaining commenced on new contracts for all New York City Divi-

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who reports to me and a Senior Counsel Heather Ryan who reports to me."

Page	line	From	To
4- 29	6	"IB"	''RD'
5- 30	10	"2103"	"2013"
6- 76	22	'Ride"	"Rider"
7- 87	24	"Quits"	"QUICS"
8- 88	2	"CUITS"	"QUICS"
9 98	3	"2013"	"2014"
10 108	1	"successor"	"predecessor"
11- 112	9	"SEPE"	"SCTE"
12- 113	2		{same}

Page	line	From	To
13- 122	20 and 25		{same}
14- 129	22		{same}
15- 130	10		{same}
16- 151	15	"Employer"	"union"
17- 151	16	"Hines"	"Heinz"

[2] The six locations covered were Southern Manhattan, Northern Manhattan, Brooklyn, Queens, Staten Island in New York State and Bergen County, New Jersey, located in New Jersey.

sion and Bergen. The same negotiator for Respondent and TWC bargained for these successor contracts at the same time. Respondent's bargaining committee consisted of representatives from Bergen and the New York City divisions of TWC; and the same representatives of TWC bargained on behalf of all its divisions.

The bargaining yielded a MOA titled, "Time Warner Cable of New York City," consisting of the six locations and signed by TWC and the Respondent. The MOA was signed by TWC's executive vice president on behalf of each division. There was one space for Respondent. The MOA reads, "The parties indicated above do hereby agree that the changes which are summarized below were agreed upon relative to the Collective Bargaining Agreement . . . which will expire on March 31, 20013 and that the full text of the applicable changes will be incorporated in a new Collective Bargaining Agreement for each Division which shall become effective upon ratification by the Union membership on April 4 2013." The Director's Decision further reflects that the first 6 pages of the MOA contain terms applicable to all divisions, and on pages 7 and 8, the parties addressed modifications for the Bergen rider. Employees of TWC then ratified the contracts in a single vote covering all 6 divisions. There was no separate ratification vote held on any of the localized terms and conditions of work contained in the location specific riders.

Subsequently, the parties executed six separate agreements, with each agreement containing a "Master Agreement," applicable to all six locations with essentially identical terms and a rider delineating terms and conditions applicable only to that specific facility.

The Decision reflected some examples of the riders and their different terms. Thus both the Bergen and Staten Island riders contained more generous vacation benefits than the master contract and the other divisions' riders; Southern Manhattan's rider allowed for different dispatch provisions; Staten Island's rider contains provisions for the hiring of temporary (summer) help. Bergen's rider conditions differing provisions on sick leave, shifts, and journeymen's pay. Additionally, each division's rider addressed standby procedures and standby wage rates.

The Decision also detailed evidence concerning community of interest factors, such as common skills, transfers and qualifications among all locations and honoring seniority when employees are transferred; and that some supervisors share oversight over multiple divisions including Bergen.

However, the Director concluded that these communities of interest factors are not determinative in appropriate unit analysis in decertification settings, and that the parties bargaining history, as detailed above, of multilocation bargaining, controlled and led to his Decision that the parties had "effectively folded the Employer's Bergen division into a multi-facility unit with the employer's New York City division." Thus the Director found in the decertification context, that a multilocation unit consisting of the six locations of TWC, including Bergen, was the appropriate unit for purposes of the petition. Therefore, the Director[3] concluded that the multilocation unit, and not the petitioned for Bergen location unit, was the unit in existence at the time the petition was filed. Therefore he dismissed the petition.

III. NEGOTIATIONS FOR A SUCCESSOR AGREEMENT

The parties began negotiations for a successor collective bargaining agreement on February 26, 2013, and continued to bargain over the course of 12 sessions culminating on March 28, 2013. During these sessions, the negotiating team was led by Kevin Smith, TWC's chief labor counsel and Michael Haught, TWC's V.P. of human resources for New York City and Northeast, and Connie Ciliberti, TWC's V.P. of human resources. Respondent's negotiating team was headed by Assistant Business Manager and Lead Negotiator Lance Van Arsdale and included Business Agent Derek Jordan, as well a committee of employees from the various locations of TWC.

Smith stated at the first TWC session that TWC was not seeking review of the Director's decision on the appropriate unit, and that these negotiations would be negotiated as one contract with common conditions of employment for all the employees in the unit, at all locations. Both Van Arsdale and Jordan agreed with Smith's comments that the parties would be negotiating for one bargaining unit.

On February 26, Respondent submitted its written contract proposals for a contract covering all the locations of TMC. The proposal was as follows:

February 26, 2013

THE FOLLOWING ARE CONTRACT PROPOSALS TO BE INCORPORATED INTO THE AGREEMENT BETWEEN LOCAL UNION NO. 3, IBEW AND TIME WARNER CABLE NEW YORK CITY LLC.

1. Three year agreement.
2. 5% increase in wages each year of the agreement.
3. Increase sick days by 3 days.
4. Add 1 week vacation for 15 years or more of employment
5. Increase amount allowed for accumulation of personal days. Unused personal days shall be accumulated for 6 years (total of 18 days).
6. Journey persons and above certified as passing the network plus certification course shall receive an additional $1.00 per hour. Journey persons and above certified as passing the CISCO certification course shall receive an additional $1.0 per hour.
7. The day after Thanksgiving shall be a holiday.
8. Double up technicians working in high risk crime areas.
9. Section 7 B 1; change date to March 31, 2013
   Section 7 B 2; change date to April 1, 2013
   Section 28 E; change date to March 31, 2013
   Section 28 F; change date to April 1, 2013
10. Increase annuity by $4.00 per day.
11. Bergen county employees in the bargaining unit shall'have the same shifts, shift differential, stand by pay,

[3] As noted above, TWC did not request review of this decision of the Director.

weekend overtime pay and night differential as the rest of the bargaining unit.

12. Increase night differential by 6%.
13. Add 1 foreman and 2 crew chiefs in Bergen County.
14. Add Veterans Day as a regular holiday.
15. Wages / starting salaries

Eliminate level 4
RS 1 $11.00 per hour
RS 2 $12.00 per hour
RS 3 $14.00 per hour
RS 4 $18.00 per hour

Local Union No. 3, IBEW retains the right to add to, delete from, or modify these proposals.

TWC submitted its proposals for a new agreement on February 28, 2013. The cover page lists the sections that TWC sought to be deleted and changed from the prior agreements with Respondent.

The document reads as follows:

Company Proposals – TWC/LOCAL 3

February 28, 2013

1. Section 3- Term of Agreement- 5 years·
2. Section 7 - Subcontracting-no subcontracting if it leads to layoff of bargaining unit personnel
3. Section 8 - Work by bargaining unit personnel- no work if It leads to layoff of bargaining unit personnel
4. Section 9 - Telephony-delete - captured In Section 6- Type of Work
5. Section 10-Work Week -Flexibility needed.
6. Section 11-Overtime - Eliminate premium for Sat. & Sun. Work
7. Section 12- Holidays -Eliminate Birthday. Employees must provide 30 day notice to take floating holidays.
8. Jib, annuity, dental- no change
9. Cultural Fund, FICA- eliminate
10. Section 26- Education - Change out NCTI for SCTE.
11. Section 32- Payroll- bi-weekly, same as non-represented personnel
12. Section 36- Wages, Wage Rates, Rate Increases, and Premiums- See attached career progression. 1% wage increases annually for Tech 5, Forman and General Forman
13. Section 37- Rights of Journeyman-incorporate A & B into Section 36
14. Section 38 - Work Performed by Employees Below Level 5 delete
15. Section 40 – Payroll Savings Plan - delete
16. Section X – Scope of Bargaining - add

TWC also included an entirely new proposal which had not been included in any of the same agreements entitled "Scope of Bargaining." It reads:

ARTICLE __

SCOPE OF BARGAINING

> The Employer and the Union acknowledge that during the negotiations which resulted in this Agreement, each party had and exercised the unlimited right and opportunity to make demands and proposals with respect to any and all lawful and proper subjects of collective bargaining. This Agreement fully and completely incorporates all such understandings and agreements between the parties and supersedes all prior agreements, understandings and past practices, oral or written, express or implied. Accordingly, this Agreement alone shall govern the entire relationship between the parties and shall be the sole source of any and all rights which may be asserted in arbitration hereunder or otherwise. No past practices existing prior to the ratification of this Agreement shall have any precedential effect.
>
> In the event the parties mutually agree to modify, change or supplement this Agreement during its terms, such modifications, changes and/or alternations shall be binding only if reduced to writing and duly executed by authorized officers, representatives or agents of the parties hereto.

The parties bargained over the course of the next month, until the parties reached agreement on March 28, 2013, on the terms of a new successor contract. This agreement was memorialized in an MOA, signed and dated March 28, 2013, reading as follows:

TIME WARNER CABLE OF NEW YORK CITY LLC.

And

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

MEMORANDUM OF AGREEMENT

The parties indicated above do hereby agree that the changes which are summarized below were agreed upon relative to the Collective Bargaining Agreement (the "Agreement" or the "CBA") which will expire on March 31, 2013 and that the full text of the applicable changes will be incorporated in a new Collective Bargaining Agreement which shall become effective, upon ratification by the Union membership, scheduled for April 4, 2013.

Section Title	Summary of Changes to Agreement
Term of Agreement	April 1, 2013 to March 31, 2017
Type of Work (Section 6)[1]	Consolidated Section 9 (Telephony) subsections B and C into Section 6.
Subcontracting and Contracting Out Work (Section 38)	• Amended dates in subsection B(1) to March 31, 2013 and B(2) to April 1, 2013. • Amended subsection C to provide that "This provision shall not apply to contractors using diagnostic equipment within 30 days of initial installation for residential installations."
Telephony (Section 9)	Deleted, see Section 6 above.
Work Week, Hours & Shifts (Section 10)	• Added Dispatch and Warehouse to shift 10C(6). • Added a Sun-Sat. 5x8 shift for install/service work, no Sat. premium for employees hired after Jan. 1, 2013 who are below Tech 5.
Overtime (Section 11)	Added subsection C: Employees, as required by the Company, will perform a reasonable amount of overtime to complete all customer commitments.
Holidays (Section 12)	• Modified subsection A to require employees to provide at least 14-days notice of selection of holiday. • Added subsection D: Any Veteran (that has provided appropriate documentation to the Company), will not be denied a request to utilize a floating holiday on Veteran's Day.
Annuity (Section 18)	Increases to the Annuity as follows • On April 1, 2014 the annuity for Tech 5 will increase by $1 per day for the duration of the agreement. • On April 1, 2015, the annuity for employees below the Tech 5 level will increase by $.50 per day for the duration of the agreement.
Social Security (Section 22)	The Company will pay the employee contribution to FICA as follows • Employees hired between April 1, 2009 and December 31, 2012

[1] Sections refer to section numbers for the current (expiring agreement). Numbers may change in successor agreement based on consolidation of language and deletion of certain obsolete sections.

	after 36 months of employment in the bargaining unit. • Employees hired after 1/1/13 after 48 months of employment in the bargaining unit.
Education (Section 26)	Transition from NCTI to SCTE program. See Attachment A for transition details.
Wages, Wage Rates, Rate Increases & Premiums (Section 36)	See Attachment A.
Rights of Journeyman, Progression to Journeyman (Section 37)	Incorporate subsections A & B into Section 36. Remaining language deleted.
Work Performed by Employees Below Level 5 (Journeyman) (Section 36)	Added subsection C: In consultation with the Union, Technicians at the RS Tech 4 level with at least 1 year of field experience, may also be assigned to perform: a. Business Class Service Work b. Survey and Design And subsection D: In consultation with the Union, Technicians at the RS Tech 4 level with at least 2 years of field experience may also be assigned to perform plant work.
Payroll Savings Plan (Section 40)	Delete

This Memorandum of Agreement is entered into this 26th day of March 2013.

TIME WARNER CABLE OF NEW YORK CITY LLC

3/26/13

LOCAL UNION NO. 3, IBEW

Attachment A

SECTION 36

WAGES, WAGE RATES, RATE INCREASES AND PREMIUMS

A. Minimum Hourly Straight Time Wage Rates:

- Tech Trainee: $10.00
- Tech 1: $11.00
- Tech 2: $12.00
- Tech 3: $13.50
- Tech 4: $17.50

B. Tech 5 (Journeyman) wage rates:

April 1, 2013	$34.00
April 1, 2014	$34.77
April 1, 2015	$35.55
April 1, 2016	$36.53

i. Tech 5 (Journeymen) shall not be demoted in pay.
ii. Tech 5 (Journeymen) may be required to perform all the work duties performed by employees at lower levels.

C. Technical Career Progression Program

Title	Min. Time in Position Requirement	Required Training	Progression
Tech Trainee ($10/hour)	1 Year	• SCTE – Understanding Cable Technology (after 180 days tenure)	Progression to Tech 1 after 1 year and passing the certification test of the required training.
Tech 1 ($11/hour)	1 Year	• SCTE Broadband Premises Installation and Service Installer ($1/hour)	Progression to Tech 2 after 1 year. Increase for required training granted upon passing the course certification test.
Tech 2 ($12/hour)	1 Year	• SCTE Broadband Premises Installation and Service Technician ($1/hour)	Progression to Tech 3 after 1 year. Increase for required training granted upon passing the course certification test.
Tech 3 ($13.50/hour)		• Home Networking with WiFi. (CompTIA Network+	To progress to Tech 4 employees must be successfully reviewed by

Attachment A

		Certification Program)	the Company, in consultation with the Union and pass the required training. Employees cannot enroll in the required training until they are successfully reviewed.
Tech 4 ($17.50/hour)		• SCTE Broadband Distribution Specialist Course ($1/hour) • SCTE Broadband Transport Specialist ($.50/hour) • SCTE Business Class Services Specialist ($.50/hour)	To be eligible to progress to Tech 5 employees must have at least 6 years tenure with the Company (with at least 3 years of field service) and complete all required training courses. Increases for required training granted upon passing the course certification test.
Tech 5: (Journeyman)		• Fundamentals of SDV, Digital Video and MPEG Video (Optional) ($.50/hour) • SCTE Broadband TelecomCenter Specialist (Optional) ($.50/hour) • Current Tech 5 (Journeyman) who have not completed the A+ certification course may complete the Home Networking with WiFi. (CompTIA Network+ Certification Program) course ($.50/hour)	Increases for required training granted upon passing the course certification test.

i. New employees may be hired in at any level below Tech 5, based on Company discretion. They will be required to complete all training requirements below their Tech level and will not receive any premium for completing training below their Tech level.

ii. Employees at the Tech 4 level may be eligible to receive an increase on April 1 of each year of this agreement based on performance, as determined by the Company.

iii. Employees hired prior to December 31, 2001 who have not completed a progression class may be eligible to receive an increase on April 1 of each year of this agreement based on performance, as determined by the Company.

iv. Non-field employees who wish to progress to Tech 5 (Journeyman) must request that the Company move them to a field position to meet the 3 years of field service requirement. The Company will assign these employees to a field operations role in a timely fashion.

v. Current employees (as of March 31, 2013) who have successfully passed the review by the Company, in consultation with the Union, to progress to the Journeyman level, will be subject to the current applicable field experience requirement based on date of hire.

vi. Current employees (as of March 31, 2013) who are currently enrolled in an approved NCTI course may complete that course and receive the applicable training premium.

vii. Current employees (as of March 31, 2013) who have completed an approved NCTI course will have the option of continuing to progress (without receiving any training premiums) by completing approved NCTI courses through April 1, 2014. To receive credit for progression purposes, the NCTI courses must be completed (including testing) by April 1, 2014.

viii. Current employees (as of March 31, 2013) who have an outstanding "failed" NCTI course can either personally pay to re-take the NCTI course and then progress to either the NCTI program (subject to v. above) or the SCTE program, or the employee can transition directly to the SCTE course that is the equivalent to the failed NCTI course and the Company will pay for the SCTE course.

ix. Current employees (as of March 31, 2013) enrolled in the NCTI Fiber Installation course must successfully complete that course then successfully complete the NCTI Fiber Testing course to meet the SCTE Broadband Transport Specialist course requirement. Current employees in the NCTI Fiber Testing course must successfully complete that course to meet the SCTE Broadband Transport Specialist course requirement. These employees then transition to the SCTE program or continue with the NCTI program (subject to v. above.) Current employees in this situation will be eligible to receive the applicable training premium for the successful completion of the NCTI Fiber Testing course.

x. Current employees (as of March 31, 2013) will be eligible for the "Alternate Progression to Journeyman" process, as outlined in the current CBA (but substituting Network+ for A+).

Attachment A

D. Foremen and General Foremen

i. The Company may appoint Foremen and General Foremen who shall be paid the following wage rates:

Foremen	
April 1, 2013	$39.08
April 1, 2014	$39.96
April 1, 2015	$40.86
April 1, 2016	$41.98

General Foremen	
April 1, 2013	$40.79
April 1, 2014	$41.71
April 1, 2015	$42.65
April 1, 2016	$43.82

ii. To be eligible for appointment as a Foremen or General Foremen, an employee must be a Tech 5 (Journeyman).

iii. A Foremen shall be appointed for a period of not less than a month and a General Foremen shall be appointed for a period of not less than three (3) months.

iv. The Company continues to have the right to downgrade Foremen and General Foremen and upon downgrade, such employees' salary will be decreased to the minimum applicable wage rate for the position into which he or she is downgraded.

v. In the event that the Company reduces the number of Foremen and General Foremen, the reduction shall be in the reverse order of seniority.

E. Crew Chiefs

i. The Company may appoint Crew Chiefs who shall be paid a premium of $1/hour.

ii. To be eligible for appointment as Crew Chief an employee must be a Tech 5 (Journeyman).

iii. Crew Chiefs shall be appointed for a period of not less than one (1) week.

F. Minimum Rates

The wage rates contained in this Agreement are listed as minimum rates and the Company may, in its discretion, elect to pay an hourly rate in excess of such minimum rate to any employee.

G. In-House Trainers

The Company will make one of its in-house trainers or, if determined by the Company, a bargaining unit trainer, available to the bargaining unit for a total for two hours each week during which employees can ask questions and seek guidance relating to their training courses.

The above findings concerning the negotiating sessions in February and March detailed above, are not in dispute, and are based on undisputed testimony and documents.

There is a dispute among the witnesses, concerning two issues, as to what was or wasn't said at the negotiating sessions. Smith, Haught, and Ciliberti testified that during these sessions, there was no discussion about inclusion of the riders from the prior agreements in the successor contract.

Jordan, on the other hand testified that Respondent's lead negotiator Van Arsdale stated at the beginning of the negotiations that Respondent wanted the riders to be included in the successor contract. Jordan did not recall whether Smith or anyone from TWC made any response to Van Arsdale's statement concerning the inclusion of the riders.

I do not credit Jordan's testimony in this regard. Rather I credit the mutually corroborative and consistent testimony of Smith, Haught, and Ciliberti that there was no discussion or mention by anyone about the inclusion of riders during the parties negotiations. I also note that Jordan's bargaining notes make no mention that Van Arsdale or anyone from the Union made such a statement, nor do they reflect any mention of discussion of the subject of the riders. Similarly Smith's bargaining notes do not reflect discussion of the riders by anyone. Furthermore, Van Arsdale, who according to Jordan made the comment concerning the Respondent's desire to include the riders, did not testify. Under these circumstances, it is appropriate to draw an adverse inference from the failure of Van Arsdale to corroborate Jordan's version of what Van Arsdale stated during the negotiations. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). *Hialeah Hospital,* 343 NLRB 371, 398 fn. 20, 402 (2004).

The Riders from TWC's 2009–2013 agreements covered the following issues:

TWC Queens–Standby Procedures.

TWC Brooklyn–Standby Procedures.

TWC Staten Island–Vacation; Temporary Employees, Work Performed by Classification; and Standby Procedures.

TWC Bergen–Vacation; Bargaining Unit Work; Sick Days; Work Schedules; Standby Procedures; and Journeyman and Other Designations.

TWC Northern Manhattan–Amendment to Compensation §11(a)(2) to allow for double pay for employees who work outside shift hours on Saturday and Sunday; Standby Procedures.

TWC Southern Manhattan–Amended §6(a) removing work regarding service and maintenance relative to local origination and related programming from the ees' jurisdiction; Dispatch Department Function; Standby Procedures.

The other area of disagreement between the witnesses concerns the issue of whether there was any discussion of the electrical engineering provision in the Master Agreements. In that regard, all of the six "Master Agreements" contained the identical provisions. (Section 36(A) Cir) in each of the other agreements.

"[a]ny existing employee who completes a Bachelor of Electrical Engineering degree at an accredited institution will not be required to take Digital Installer, Installer Technician, Service Technician and System Service Technician Course and will immediately receive a wage increase of $2.50 per hour in lieu of the applicable increases for such "Courses."

As noted this clause appeared in all the prior Master Agreements, not in the Riders. The clause is Section 36(A)(iv). Section 36 is entitled Wages, Wage Rates, Rate Increases and Premiums. Section A(i) lists minimum straight rates for existing employees.

Sections (ii) (iii) and (iv) of that Section reads as follows:

(ii) Any Existing Employee below Journeyman who becomes A+ certified will move to the RS 4 salary or, if such employee is at that time earning $16.60 or more per hour, he/she will move to a salary equal to his current hourly wage plus an additional $1.00 per hour. Additionally, any Existing Employee below RS 4 who is certified as passing the NCTI courses on Digital Installer and Installer Technician or such other comparable courses as may be required by the Company, in consultation with the Union (the "Digital Installer" and "Installer Technician" courses), shall receive an additional $0.50 per hour. Any Existing Employee below RS 4 who has been certified as passing the Digital Installer and Installer Technician courses and who is then certified as passing.

> (iii) Any Existing Journeyman (Employee who was a Journeyman as of March 31, 2001) who is certified as passing the NCTI course on Fiber Optic Technician or Advanced Technician or such other comparable courses as may be required by the Company, in consultation with the Union (the "Fiber Optic Technician" and "Advanced Technician" Courses), will receive an additional $0.50 per hour for the first course which they are certified as passing and an additional $1.00 per hour for the second course which they are certified as passing. If, after being certified as passing the Fiber Optic and Advanced Technician Courses, such Existing Journeyman becomes A+ certified, he or she will receive an additional $0.50 per hour. The hourly increases for the Fiber Optic Technician and Advanced Technician Courses and the A+ certification will remain with such Journeyman.
>
> (iv) Any Existing Employee who completes a Bachelor of Electrical Engineering degree at an accredited institution will not be required to take the Digital Installer, Installer Technician, Service Technician and System Technician Course and will immediately receive a wage increase of $2.50 per hour in lieu of the applicable increases for such Courses.

According to Jordan, Section 36(A)(iv) (the electrical engineering increase) was not discussed during negotiations, but the Union assumed that it would be included in the successor agreement, since it had been included in all the prior agreements with TWC, covering each of the facilities and that this clause was in the main agreements and not in the Riders.

However Smith testified that the electrical engineering in-

crease clause (in lieu of taking courses) was discussed during negotiations and that Jordan on behalf of Respondent raised the issue. Both Smith and Jordan's bargaining notes support Smith's testimony that Respondent did raise the issue during negotiations. Smith asserts and Jordan agrees that the parties spent a considerable amount of time in negotiations discussing training issues and TWC's proposals to transition training vendor NCTI to training vendor SCTE. These discussions about career progression and alternative career progression were previously included in Sections 36(A)(ii), (iii), and (iv) as reflected above.

During these discussions, Smith testified that Respondent through Jordan proposed that alternative career progression for employees with an electrical engineering degree (in the previous agreements) be included in the new agreement. Smith replied on behalf of TWC that TWC did not want to discourage an electrical engineering degree, but that such a degree was not a substitute for training in cable television, as reflected in TWC's training proposals, and transfer from NCTI to SCTE training to an alternative progression. Thus TWC stated that it would not agree to the electrical engineering provisions that had been included in the prior agreements. I credit Smith's testimony in this regard, since it is supported by the bargaining notes of both Smith and Jordan.

Smith did not testify that Respondent explicitly agreed during negotiations that this provision would not be included in any new agreement. However, Smith testified that in his view, Respondent by agreeing to the MOA, without the inclusion of this alternative form of progression as a substitute for the training, would have been reflected in the prior agreement, Respondent implicitly agreed with TWC's view that this clause was not agreed upon and not part of the contract to be executed.

A further area of conflict in the testimony, involves Jordan's testimony that Respondent did bring up during the subject of the Bergen Rider during negotiations, and had requested that TWC bring up the employees at Bergen to the same level as employees at other facilities with respect to standby pay, which were part of the Riders to these agreements. According to Jordan TWC agreed to that proposal of Respondent. Smith testified that he didn't recall any discussions about Bergen standby pay during negotiations. However, Jordan's bargaining notes of 3/26/13, reflects the following "Equalization of Bergen, shift differentiation standby pay, weekend, overtime, vacation." A check mark is included next to these comments. I conclude that these notes support Jordan's testimony that TWC did agree during negotiations to equalize the various portions of the Bergen sites with the Rider in the other agreements. I also note that Smith did not unequivocally deny that the parties had discussed or agreed to the Bergen Rider Equalization as Jordan testified.

Additionally while Haught and Ciliberti both testified that there were no discussions about including Riders to a successor collective-bargaining agreement, neither Haught nor Ciliberti denied or disputed Jordan's testimony that the Union did bring up at negotiations, that Respondent wanted equalization of the employees at Bergen with employees at other locations concerning various issues, such as standby pay. Notably, standby pay was not mentioned in the Master Agreements, and only appeared in the prior Master Agreement.

Finally, Jordan's testimony is also supported by Respondent's written proposals submitted on 2/26/13 which stated in Section 71: "Bergen employees in the bargaining unit shall have the same shifts, shift differential, standby pay, weekend, overtime pay and night differential as the rest of the bargaining unit."

IV. RATIFICATION OF AGREEMENT

After the parties executed the MOA, as reflected above, on March 28, 2013, Respondent conducted a ratification vote sometime in April of 2013. The vote was conducted amongst members of the employees at all locations in one vote. Respondent's officials read off the terms of the MOA, with no mention of any Riders from the prior agreements that had been in effect. The agreement was ratified by the employees.

V. TWC SENDS DRAFT SUCCESSOR AGREEMENT TO RESPONDENT FOR EXECUTION

TWC implemented all the terms reflected in the MOA, as of April 1, 2013. This included increases in wages and increases in payments to the Union's annuity fund.

Subsequent to the Respondent's ratification of the parties' agreement, on May 13, 2013, Jordan sent an email to Smith requesting a copy of a draft successor agreement for the Union's review.

On May 14, 2013, Smith provided TWC's first draft successor agreement to Jordan. Subsequently; Jordan asked Smith for a "redline" version of the successor agreement. Smith sent that document to the Respondent as well. Both of the drafts submitted contained no references to any of the Riders from the prior agreements, nor did they include the provision concerning the electrical engineering degree, and increases for that degree, which had been included in all of the prior Master Agreements.

That section was not included in the draft agreement, submitted by TWC, because according to Smith, Respondent by signing the MOA, without any mention of that provision, had agreed to the eliminations of that provision from the new agreement. Smith noted that Respondent had raised the issue during negotiations, that it wanted to include the electrical engineering bonus in the new agreement, but that TWC had rejected that request and indicated that the electrical engineering degree is not a substitute for the training that is required for the alternative progression increases that the parties bargained about and had reached agreement on.

The draft agreement that TWC submitted to Respondent incorporated a large number of provisions identical to the prior agreements executed between TWC and Respondent for each location. Smith admitted that none of these provisions were discussed during the current negotiations. These provisions include Section 1 (Jurisdiction), Section 4 (Union Security), Section 5 (Dues Deduction), Section 13 (Vacations), Section 14 (Personal leave, death, family and sick days), Section 15 (Uniforms), Section 16 (Jury Duty), Section 19 (401K), Section 23 (Discharge and Suspension), Section 24 (Grievance and Arbitration), Section 25 (Sanitary Facilities), Section 27

(Travel Time), Section 28 (Layoffs), Section 29 (Severance Pay), Section 30 (Shop Steward), Section 31 (Cessation stoppage of Work), Section 33 (Probationary Period), Section 35 (Workers Compensation), Section 39 (Favored Nations Clause), Sections 41 (Driver's License), Section 42 (Discrimination Prohibited) Section 43 (Franchise Agreement) Section 45 (Posting Jobs), Section 46 (Assignability) Section 47 (Drug Testing), Section 48C (Termination), Section 49 (Savings Clause).

Section 2 of the prior agreements was entitled Recognition. These Agreements all contained identical language stating that the Union is the representative for all employees of the company covered by this agreement in the bargaining unit as hereinafter described and defined. The bargaining unit was not described any more specifically in the agreements, except that the preamble to each prior agreement reflected that the agreement was between the Union and TWC on behalf of its individual division, i.e. Bergen, Staten Island, Brooklyn, Queens, etc.

Consequently, the Preamble Clause in the proposed agreement reflected that the contract was between TWC on behalf of its six locations and the Union, and the recognition clause reflected that the Respondent shall be the exclusive bargaining agent for all employees of TWC at the six locations covered by the Agreement.

The proposed agreement by TWC also included a number of provisions that were discussed during the negotiations, and proposals were made by one side or the other for changes, but no agreements were reached on the changes or modifications proposed. Thus TWC incorporated in its proposed agreement, the provisions that had been included in the prior agreements, but that the parties had not agreed to change or modify. These provisions included Section 8 (Work by nonbargaining unit personnel), Section 20 (Education and Cultural Trust Funds), Section 32 (Pay Roll Week), and Section 34 (Management Rights).

Section 44 of the prior agreements was entitled Bargaining Unit Assignments. These agreements provided that employees hired after March 1, 2005, will be assigned to one of the bargaining units. TWC may in its discretion upon two week's notice assign any such employee to work in another bargaining unit for a minimum of 2 weeks. The parties further agreed that for employees hired prior to March 1, 2005, TWC retained the right to temporarily transfer, in consultation with the Union, such employees to other bargaining units, in the event of an emergency.

Since the parties had during the negotiations agreed on one bargaining unit, TWC's proposed agreement reflected this agreement, as the Union's proposal, entitled Bargaining Unit Assignments. This states that employees hired prior to the March 1, 2005, will be assigned to one of the locations in Section 2. Recognition and that TWC may upon 2 weeks notice assign such employee to work at another location for a minimum of 2 weeks. The proposed agreement also provided consistent with the prior separate agreements, that for employees hired prior to March 1, 2005, TWC can temporarily transfer such employees to other locations in the event of an emergency.

I note that the MOA signed by the parties which purported to reflect all the changes, modifications, and deletions from the prior agreements makes no reference to the Section on Bargaining Unit Assignments.

VI. RESPONDENT RESPONDS AND THE PARTIES BARGAIN FURTHER

On July 8, 2013, Jordan responded to Smith by email asserting that the draft copy of the Agreement sent to Respondent did not contain the Riders, or the language pertaining to the electrical engineering degree.

The email reads "The draft copy of the Agreement does not contain the side letters from the previous Agreements. Also, the new progression in the Agreement does not include language pertaining to employees who complete a Bachelor Degree in Electrical Engineering and what courses will be excluded from the progression process who completes a Bachelor in Electrical Engineering in place of this. During negotiations it was agreed that this would remain in place. Please respond."

Smith responded to Jordan by email later on in the day of July 8, 2013, attaching a redlined agreement. Smith also made the following comments, in response to Jordan's problems with TWC's draft agreement. "Let me check back on my notes about the Electrical Engineering degree language. On the side letter issue, the negotiations were very clear on this issue, we have one bargaining unit. Therefore, there are no side letters. That said, we agreed with respect to Bergen and with other locations that we are not changing the various shifts that employees were working in the particular locations. When do you expect to get a signed copy back to us? It is more than 3 months since we reached agreement."

Subsequently, Smith and Jordan had a telephone conversation about the matters in dispute. Smith told Jordan that the Riders and the electrical engineering degree provision had not been agreed upon during the negotiations. Smith also explained to Jordan, that the electrical engineering degree was not relevant to SCTE Training because it didn't have anything to do with Cable TV Training.

On September 9, 2013, TWC and Respondent met at TWC's office on 23rd Street. Present were Smith and Quigley, from TWC and Jordan and Van Arsdale from Respondent.

The parties discussed several issues at this meeting including Respondent's concerns about metric scoring that TWC was using to evaluate technicians in the field and TWC's intention to put the General Foreman in foreman positions, which Respondent vigorously opposed.

Jordan brought up the issues regarding the collective-bargaining agreement and the failure of TWC to include Riders in the proposed agreement. Jordan specifically emphasized the Northern Manhattan Rider, which contained premium, pay for employees' salary working overtime on weekends pay, and the Southern Manhattan Rider, which covered general journeyman positions in dispatch. Jordan also raised the issue of the electrical engineering degree and continuing the alternative progression for electrical engineers that had been included in the expired agreements.

Smith responded that the Riders were not agreed to during negotiations, but that TWC would look into it and see if there were any aspects of the Riders that TWC would be willing to carry over into the collective bargaining agreement. Smith emphasized that the MOA had been signed which did not contain any reference to the Riders, and that the parties had reached agreement on terms for a new contract.

The Union replied that it wanted TWC to look into what aspects of the Riders TWC could agree to, but continued to demand that all the Riders be included in the collective bargaining agreement to be signed.

Although Smith had promised Respondent on September 9 that it would look into whether there were any Riders that TWC would be willing to carry over into the new agreement, there is no record evidence as to whether or not it did so at that time. The next communication to Respondent was an email from Smith to Jordan on December 10, 2013. The email reads, "Happy Holidays. Although the parties reached agreement in March of this year, the Company still has not received an executed collective bargaining agreement from Local 3. Please forward me an executed agreement at your earliest convenience." Smith forwarded another copy of the draft collective agreement; that TWC had previously sent to Respondent for their execution.

Jordan replied by email on January 6, 2014. It reads:

> "Happy New Year Kevin. It is clear that we have reached agreement. However, in our meeting that took place on September 9, 2013, we discussed the flawed metric of the repeat call policy, the EE degree, and most important the "RIDERS" to the CBA which must remain in place. Your response was that you the Company would review it and get back to us. We are still awaiting your response."

On January 13, 2014, Jordan sent another email to Haught entitled Executed CBA.[4] On February 19, 2014, the parties met again to discuss various labor relations issues. Smith Haught, Jordan, and Van Arsdale attended this session. During this meeting, Van Arsdale brought up the recent announcement that TWC and Comcast were going to merge. Van Arsdale asked several questions about the merger, including whether TWC could get Comcast to assume the collective bargaining agreement with Respondent. Smith responded that they would need a signed and executed collective-bargaining agreement, and the Union had not signed the contract. Van Arsdale replied, "You know we have a collective bargaining agreement."

At some later point during the meeting, Van Arsdale raised the issue again stating, that the Union wanted the Riders included in the collective-bargaining agreement.

After this meeting, Haught and Jordan had several telephone conversations about various labor relations issues. In a conversation in early March of 2014, Jordan told Haught that Respondent would not sign a successor contract without inclusion of the Riders. Haught replied that he would talk to Smith about it and get back to Jordan.

Subsequently, Smith, Haught, Cilberti, and Quigley met and discussed the matter. They decided that although TWC had not discussed the Riders during negotiations, they would try to come up with an offer to try to settle and move "this on." Therefore, the TWC representatives discussed and came up with a proposal which included the Riders from the prior agreements that would be included in a new-agreement.

As a result, TWC submitted to Respondent a new proposed successor contract, which included some but not all the Riders from the prior agreements. This proposed agreement was similar to the prior proposed agreement that it had submitted for Respondent, but it added a new Section 36, entitled standby. This provision incorporated the standby provisions that had been incorporated in all of the prior agreements. Additionally, the proposal included modified Riders from the Staten Island and Bergen Agreements, which had provided for different benefits and conditions for these employees.

The prior Bergen Rider provided that employees at Bergen who were employed continuously with the Company for 10 years or more as of January 1, 2006, will continue to qualify for 5-weeks vacation upon reaching their 15-year anniversary.

TWC modified this section of the prior Riders, in their proposed Rider for the new agreement, by providing under vacation, that "the employees listed below are eligible for 5 weeks of vacation per contract year during the term of the parties Agreement. All other employees are subsequent to the Vacation provisions listed in the Agreement." The proposal then listed the names of seven employees eligible for the 5 weeks of vacation.

The prior Rider covering the Bergen employees, included sections entitled Bargaining Unit Work, Sick Days, and Work Schedules for the employees. All of these sections were included without change in TWC's revised Rider for Bergen employees submitted to Respondent in March of 2014.

The Rider to the prior agreement with respect to Bergen employees contained almost identical standby provision to the Riders at the other facilities. However, there was one slight difference. The allowance provided for stand-by Technician employees to be paid in addition to wages for hours worked and call outs, was $21 per day Monday to Friday, and $31 per day on Saturdays, Sundays, and Holidays. In contrast the rates provided for similar employees at the other locations, in the other Riders, called for $26 per day and $39 respectively, for the days involved.

In the proposed agreement sent to Respondent in March of 2014, TWC as noted included the Riders from all agreements in a new provision[5] in the Agreement, with the same provisions for all employees at all locations. Thus, all employees would receive $26 per day Monday through Friday, and $39 on Saturday, Sunday, and Holidays as a call in pay allowance. This includes the Bergen employees whose previous Riders had provided less of an allowance for them for this activity.[6]

[4] In this email Jordan referred Smith to Jordan's January 6, 2014 email, described above and said that he was not sure if Smith had received it. Thus Jordan attached the January 6 email again.

[5] Sec. 36

[6] It is noted that TWC first agreed to bring the Bergen employees up to the level of other employees during negotiations.

> The prior agreement which has been in effect for the Staten Island employees also provided for different vacation benefits for Staten Island employees, grandfathering their vacation schedules, as described therein.

TWC's proposed Rider in March 2014 modified that Rider, similar to its proposed modification of the Bergen Rider. Thus it provided that the "employees listed below are eligible for 5 weeks of vacation per contract year during the term of the Agreement. All other employees are subject to Vacation Provision outlined in the Agreement." The proposed Rider then listed the names of the employees eligible for this enhanced vacation, which in this case, included 26 employees.

The Southern Manhattan Rider to the 2009–2013 CBA contains a dispatch provision unique to Southern Manhattan, which states:

> (a) Outbound dispatch of bargaining unit employees and technical Support functions will be performed by bargaining unit employees at the Journeyman level (Level 5).
> (b) Clerical dispatch functions at the Company, including, but not Limited to telephone activities, computer activities, reports and log preparation, will be performed by members of the bargaining unit Whose hourly wage rate shall not exceed that established for employees at Level 4. These Level 4 Dispatch employees shall, on their anniversary date receive the percentage wage increase granted to Journeyman in that year of the Agreement.

The proposed agreement sent by TWC to Respondent in March of 2014, did not contain any reference to or include the provisions of this Southern Manhattan Rider.

The Northern Manhattan Rider to the 2009–2013 CBA contains a provision unique to Northern Manhattan that states:

> Section 11(A)(2) (Overtime) of the Agreement is amended to read as follows:[7]
>
> Any time worked on a Saturday or Sunday shall be paid at the applicable rate, either straight time or time and one half. Work beyond the assigned shift hours shall be paid at a rate of double time.
> However, the Northern Manhattan Rider that Mr. Smith sent Mr. Jordan on March 6, 2014, modifies the prior Rider as indicated in bold:
>
> For any employee hired prior to April 1, 2013**,** performing work in the Northern Manhattan location, Section 11(A)(2) of the Agreement is amended to read as follows:
>
> Any time worked on a Saturday or Sunday shall be paid at the applicable rate, either straight time or time and one half. Work beyond the assigned shift hours shall be paid at a rate of double time.

Additionally, as noted each of the prior agreements contained a provision for extra pay for employees who had electrical engineering degrees, who would not be required to take the courses specified in the other sections of the section, which would entitle employees to increases in pay.

TWC did not include this provision in the proposals sent to Respondent in March of 2014, as it did not in the previous proposed agreement sent to Respondent in 2013. As Smith explained TWC did not include it, because in TWC's view, Respondent by signing the MOA on March 28, 2013, without any references to this provision had agreed that it would not be included in the Agreement, although it had been included in all the prior agreements. Smith noted that this electrical engineering provision had been brought up by Respondent during negotiations and that TWC had rejected Respondents request that it be included in the new Agreement. Thus since this provision was part of the bargaining for the alternative progression provisions that were agreed to and bargained about and included in the MOA, TWC believed that Respondent had agreed, that this provision would not be included in the new contract by signing the MOA, which contained no reference to this provision.

On March 6, 2014, Smith submitted TWC's revised proposal to the Respondent, with an email to Jordan, in which Smith explained TWC's proposal. The email explained that TWC had "simplified and clarified the Riders and gotten rid of dated language. For example on Staten Island and Bergen Riders we have just listed those employees with grandfathered vacation entitlements. As for the CBA, we have added the standby procedures under Section 35, which are consistent throughout the bargaining unit, for the CBA. Please let me know if you have any questions about the documents."

By email dated March 7, 2014, Mr. Jordan responded to Smith "it seems that you have mistakenly left out the Southern Manhattan Rider. I will be back in the office Monday afternoon to continue reviewing the rest of the Riders and the Agreement to see if anything else was mistakenly left out."

By email dated March 7, 2014, Mr. Smith responded:

> Happy to review it with you after you have looked at them, but there is no mistake. There is no reason for a Southern Manhattan Rider because the standby language is the same everywhere and the other language (concerning dispatch) is outdated and now irrelevant.

By email dated March 10, 2014, Mr. Jordan responded "the language in the Southern Manhattan Rider concerning dispatch is not outdated, is very relevant and must remain part of the CBA."

To date Respondent has failed to sign any of the proposed collective-bargaining agreements sent to it by TWC. Jordan made it clear during his testimony that Respondent would not sign the proposed agreements because of the failure of TWC to include the Electrical Engineers provision, and TWC's failure to include the Southern Manhattan Rider.

TWC filed the instant charge with the Region on April 2, 2014. Respondent also filed charges with the Region alleging that TWC violated Section 8(a)(1) and (5) of the Act, by failing to sign an agreed-upon contract. (Containing all the Riders) The Region dismissed this charge, Respondent appealed the dismissal, and the dismissal was sustained by General Counsel.

TWC filed a lawsuit against Respondent in April of 2014

[7] Sec. 11(A)(2) of the 2009–2013 CBA states "(a)ny time worked on a Saturday or a Sunday shall be paid at the rate of one and one-half times the employee's regular straight time hourly rate."

alleging that Respondent violated the no-strike clause in the contract between the parties in September of 2013, March of 2014 and on April 2, 2014. TWC sought an injunction in Eastern District Court to enjoin Respondent's allegedly unlawful conduct.

A hearing was held before Judge Jack Weinstein on various dates in April and May of 2014. Judge Weinstein granted Respondent's Motion to dismiss the petition for injunction, and issued an opinion dated May 5, 2014 (*Time Warner v. IBEW Local 3,* Nov. 14 (CV—2437 (JBW 2014 U.S. Dist. V Lexis 6222 72(E.D.N.Y. May 5, 2014).

In his Decision, the Judge dismissed the injunction petition, based on the Norris-La Guardia Act and *Boys Market* principles, inasmuch as the disputes involved were subject to arbitration, and were in the process of being arbitrated, and there was no evidence or likelihood of further violations of the no-strike clauses. The Judge found that two of the incidents described in the complaint did constitute a strike in violation of the no-strike clause but since these incidents were being arbitrated there was little likelihood of future work stoppages or strikes in violation of the no-strike clause. He noted that the underlying claims for damages by TWC in the action are still pending and the pending arbitration adequately protects TWC, and do not justify an injunction.

In this action, it does not appear that either party took the position that no contract was in effect. Indeed the parties, as noted, are arbitrating the claims of TWC pertaining to the events complained of, under the arbitration clause of the contract.

In that action, TWC attached its verified complaint, as Exhibit A, identified by TWC's Vice President John Quigley, as the "current collective bargaining agreement in effect from April, 2013 through March 31, 2014." The CBA that TWC filed with the court included the Southern Manhattan Rider, and in fact is the only Rider attached to the alleged contract. The contract that TWC submitted included the MOA signed by the parties on 03/28/13, the prior contract between TWC Southern Manhattan Division and Respondent effective from 2004 through 2013, and the Southern Manhattan Division Rider, which included standby provisions, as well as the provisions relating to Dispatch and Department functions, that TWC had not included in any of the drafts of proposed agreements that it submitted to Respondent. TWC adduced no testimony so to why it included this Southern Manhattan Rider, in the action that it filed, as being part of the contract allegedly in effect between the parties.

VII. ANALYSIS AND CONCLUSIONS

Section 8(d) of the Act requires either party, upon the request of the other party, to execute a written contract incorporating an agreement reached during negotiations. *H.J. Heinz Co. v. NLRB* 311 U.S. 514 (1941), *Windward Teachers Assn.,* 346 NLRB 1148, 1150 (2006).

Section 8(b)(3) implements that obligation by making it an unfair labor practice for a union to refuse an employer's request to sign a negotiated agreement. *Windward Teachers Assn.* supra*; Graphic Communications Union District 2* (*Riverwood International USA)*, 318 NLRB 983, 990(1995). However, this obligation arises only after a "meeting of the minds on all substantive issues and material terms," *Crittenton Hospital,* 343 NLRB 717, 718 (2004).

The General Counsel bears the burden of proving not only that the parties had the requisite "meeting of the minds" on the agreement reached, but also that the document which the Respondent refused to sign accurately reflected that agreement. *Windward Teachers Assn.* supra*; Kelly's Private Car Service,* 289 NLRB 30, 34 (1988).

The expression "meeting of the minds" is based on the objective terms of the contract, not on the parties' subjective understanding of those terms. Thus, subjective understanding or misunderstanding of the meaning of terms that have been agreed upon are irrelevant, provided that the terms are unambiguous "judged by a reasonable standard." *Hempstead Park Nursing Home,* 341 NLRB 321, 322 (2004); *Vallejo Retail Trade Bureau,* 243 NLRB 762, 767 (1979), enfd. 626 F.2d 119 (9th Cir. 1990).

However, when the terms of a contract are ambiguous and the parties attach differing meanings to the ambiguous terms, "meeting of the minds" is not established." *Chicago Parking Assn.,* 360 NLRB No. 132, slip op. at 1, fn. 4 & 15 (2014); *Hempstead Park Nursing,* supra.

In applying the principles of the above precedent, I conclude that General Counsel has fallen short of meeting its burden of proof that the parties had reached a "meeting of the minds" on all substantive issues, or that any of the documents submitted by TWC to Respondent for execution accurately incorporates any such agreement.

There is no dispute that the parties executed a MOA on March 28, 2013, which both parties believed represented an agreement to execute a successor contract, by both parties incorporating the terms agreed upon. Indeed the record established that the parties shook hands, Respondent implemented the improvements set forth in the MOA, and the Respondent's employees ratified the agreement reached by the parties, based upon the terms of the MOA.

However, the Respondent refused to execute the documents presented to it by TWC in July and December of 2013, allegedly incorporating the parties' agreement, because those documents did not include the Riders that had been included to all the prior collective-bargaining agreements between the parties, and because they didn't include a clause which had appeared in the prior collective-bargaining agreements, relating to electrical engineering degrees for employees and the entitlement of employees for enhanced pay based on possession of such degree.

Essentially the issue as to whether there was a "meeting of the minds" between the parties, that as a result of executing the MOA, the parties had agreed that the Riders which had been attached to all the prior contracts and the electrical engineering degree clause which had been included in all the prior contracts, would not be part of the successor contract that the parties would execute and be bound by.

I conclude that while TWC believed that the parties had agreed by signing the MOA that the Riders and the electrical engineering clause would no longer be part of the employees terms and conditions of employment, and would not be in-

cluded in the successor contract, I also find that Respondent believed the opposite, and thought that these terms would continue and be included in the new contract.

I also find that the terms of the MOA are ambiguous as to these two issues, and that therefore General Counsel has failed to establish the requisite "meeting of the minds," between the parties that these items would not be part of a new contract.

The language of the MOA states, "the changes which are summarized below were agreed upon relative to the CBA which will expire on March 31, 2013, and the full text of the applicable changes will be incorporated in a new CBA." The first two pages of the MOA list 14 items that the parties agreed to change in the 2009–2013 CBA; i.e. add, modify, consolidate or delete. The MOA does not state that either the Riders or the electrical engineering provisions were being deleted. Thus while the MOA detailed modifications, deletions or consolidations of various provisions from the prior agreements, it made no mention of the Riders whatsoever, nor of the electrical engineering provision in the prior agreements. Further the MOA is silent concerning the removal of standby procedures, which were included in Riders for all locations, and inserting them or not in the CBA.

I agree with Respondent that the above evidence demonstrates that the parties know how to memorialize their agreement to delete items from the labor contract. Yet while the MOA made specific references to sections of the prior contracts that were to be deleted or modified, the MOA made no reference to the Riders of the electrical engineering provisions, which had always been considered by the parties to be part of the CBA. Indeed, Riders are commonly considered by the parties as part of the collective-bargaining agreements, and constitute terms and conditions of employment of employees, which cannot be changed absent agreement of the Union bargaining, or bargaining to impasse with the Union.

It is therefore difficult to conclude, as the General Counsel and Charging Party contend, that by signing the MOA, Respondent was agreeing that the Riders and the electrical engineering change would be deleted from a successor contract agreement.

General Counsel and Charging Party argue, that by signing the MOA, without any reference to either the Riders of the electrical engineering clause, Respondent was agreeing that these items, although previously included, as part of the terms and conditions of employment at all prior locations (the Riders and the electrical engineering provision which had been included in the body of all the prior contracts) would be deleted from the successor agreement.

Their arguments are somewhat different with respect to these two issues. With respect to the inclusion of the Riders, General Counsel and Charging Party contend that the bargaining for this contract was different from past bargaining, inasmuch as the parties were now bargaining for one contract, covering a collective-bargaining unit of all six locations, as per the Director's Decision in Region 22, concerning the RD petition involving the Bergen unit. Thus, since the Director had dismissed that petition, finding that the parties had by their bargaining history made the multilocation appropriate unit rather than the single unit in the prior contract between TWC and Respondent in covering the Bergen employees. TWC agreed not to appeal that decision, and informed Respondent that the parties would now be bargaining one contract for all locations, in one bargaining unit, and Respondent agreed.

Therefore, it is argued that this agreement by Respondent, and their bargaining on that basis demonstrates that Respondent was in agreement with TWC that the Riders which had not been part of any of the prior master agreements would no longer be part of the employees' terms and conditions of employment. I do not agree.

While I do agree that the parties had agreed to bargain for a successor contract as one bargaining unit, as opposed to six separate contracts and six different units, in view of Director's Decision, that fact does not necessarily preclude the inclusion of Riders on different terms and conditions of employment for different locations or different classifications. It is not uncommon or unusual to have some differences in terms of employment for employees in different classifications in one contract, in a single unit. Indeed, within the prior contracts for each separate contract, there were numerous provisions, which set forth different benefits for employees in different classifications with respect to wages, vacations, annuities and other benefits.

Most significantly, during the bargaining, the parties had discussed and agreed to Respondent's proposal to bring the Bergen employees standby pay up to the standby pay that was being received by employees at the other locations. Since standby pay appeared only in the riders to each of the prior agreements, and did not appear in the body of any of the prior master contracts, this finding demonstrates that the parties were contemplating carrying over the riders into the successor agreements.

Additionally, I note that in the complaint filed by TWC in its action against Respondent is Federal Court TWC alleged that the contract in existence between the parties involved the Southern Manhattan Rider, which it attached to its complaint in that action. I agree with Respondent that this action can be construed as an admission against TWC, that this rider was and is part of the contract between the parties, and that they did not agree to exclude the riders from the successor contract agreed upon by signing the MOA.

I further agree with Respondent that TWC's bargaining subsequent to the Respondent's rejection of TWC's initial draft contract, wherein it agreed to include the standby riders, and the Northern Manhattan Rider (albeit with one modification, which TWC unilaterally made), undermines TWC's position that the riders should not be included, and that the parties had agreed to exclude the riders from the new agreement. In that regard TWC, in its revised agreement, proposed that the standby provisions which had been previously included in the Riders to the prior contracts be incorporated in the master agreement, entitled Section 36 Standby. This provision provided for the same standby benefits for employees at all locations, in contrast to the prior riders which had provided for lower wages for Journeyman Standby Technicians, employed at Bergen, than what had been paid to employees at the other TWC locations.

Furthermore, the contentions of General Counsel and TWC, that the signing of the MOA by Respondent, without any mention of inclusion of the riders, establishes a meeting of the minds that they were not to be included in the successor agreement, is further undermined by the evidence that a large number of provisions that were included in the prior master agreements at each location were not discussed during the negotiations at all, but yet still found their way into the proposed agreement submitted by TWC allegedly incorporating the contract agreed to by the parties.

Finally, I note that TWC, in its revised proposals submitted to Respondent in March of 2014, also included a rider to the new collective-bargaining agreement, entitled Staten Island Rider, Bergen Facility Rider and Northern Manhattan Rider, which were to be executed separately from the Master Agreement. These riders delineated separate provisions for these locations. For Bergen it reflected different vacation, holiday entitlements and work schedules for employees at Bergen, as well as a different description of bargaining unit work, from the description of bargaining unit work in the Master Agreement. These provisions were consistent with the prior Bergen rider, in that it grandfathered enhanced benefits for these employees that they had received when they were employed by a different employer, prior to TWC taking over that facility. The only difference between the proposed rider and the rider in the last agreement was a minor modification. The prior rider stated that employees employed continuously with the company for 10 years or more as of January 1, 2006, "will continue to qualify for five weeks of vacation upon reaching their 15 year anniversary." The Rider proposed in 2014, listed seven named employees from Bergen, who were eligible for 5 weeks of vacation who are presumably the same employees who were covered by the prior riders, some had been employed for 10 years or more as of January 1, 2006, and some still employed by TWC.

TWC also included a Staten Island rider, covering the Staten Island employees. This Rider pertained only to vacations, and similar to the Bergen Rider, reflected the enhanced grandfathered vacation benefits to Staten Island employees which had been incorporated in the prior Staten Island Rider, except that it specifically named the employees entitled to this enhanced vacation benefit.

TWC also included a Northern Manhattan Rider, also to be executed separately, from the Master Agreement, but which TWC modified and changed from the prior Northern Manhattan Rider.

These bargaining proposals by TWC are demonstrative that there was no meeting of the minds in March of 2013 when the parties signed the MOA, that Riders would be excluded from the successor agreement as contended by General Counsel and Charging Party.

Accordingly, I conclude that General Counsel has fallen short of meeting its burden of proof that the parties reached a meeting of the minds on all terms of a successor agreement in March 2013 even though they signed an MOA, and that the proposed agreement submitted by TWC to Respondent in January and December of 2013, incorporated the full agreement of the parties.

Rather I conclude that the terms of the MOA were ambiguous as to whether the riders from the previous agreements were to be included in the successor agreement. I find that the parties had plausible but different understandings and beliefs as to this issue, and therefore there was no meeting of the minds and no contract. *Chicago Parking Assn.,* supra*,* 360 NLRB No. 132 (Ambiguous agreement but different plausible interpretations, created no contract); *Crittenton Hospital,* supra, 343 NLRB 718, 719 (no meeting of the minds found, since General Counsel had not established whether or not parties had agreed to delete disputed provisions from agreement); *Hempstead Park Nursing Home,* supra, 341 NLRB at 323–324 (parties attached reasonable but incompatible meanings to certain terms set forth in parties' MOA); *Cherry Valley Apartments,* 292 NLRB at 38–40 (1988) (parties operating under illusion that they were agreeing or had agreed to terms of agreement, with a separate different understanding of the terms of agreement); *Teamsters Local 289 (Reed & Graham),* 272 NLRB 348, 350–351 (1984) (General Counsel has not met the burden of proof that parties reached binding agreement on a contract which did not contain the rider agreement, which had been attached to prior agreements); *Vallejo Trade Bureau*, supra at 767 (letter of understanding ambiguous, and General Counsel failed to show meeting of the minds and that parties reached full agreement on terms for a new contract).

With respect to the issue of the electrical engineering degree provision, General Counsel and Charging Party argue that a meeting of the minds that this provision would not be included in the new contract has been established inasmuch as the parties bargained about that subject, Respondent had requested that it be retained, and TWC declined to do so. Further, the parties bargained about changing the alternative provision system of the prior agreement, which had included the disputed provision, and reached agreement on a new Section 36 of the Agreement, which was set forth in the MOA, without this alternative provision.

I find this argument to be somewhat persuasive, but other evidence tends to point in the other direction. Thus the record discloses that the parties also bargained about a number of other provisions which had been included in the prior Master Agreement, during which the parties had proposed and discussed modifications of changes. However, since there had been no agreements reached on the modifications or changes proposed by the parties, TWC included in its proposed agreements sent to Respondent in July and December of 2013 the identical provisions that were in the prior agreements, without change, even though there had been discussions about changes to them during bargaining. Thus in these cases TWC included the prior clauses in its proposed agreement which is inconsistent with its position not to include the electrical engineering provisions, which had also been discussed during bargaining, but with no explicit agreement reached by the Respondent to delete this provision.

Indeed, the fact that this provision had been included as one section dealing with alternative progressions, albeit with a separate lettering, does not mean that there was an agreement to delete it from this contract. Thus, in past years, this provision, which provided for an extra payment for employees, in

lieu of the changes set forth in other provisions of the section, was included as an alternative to the changes specified. This practice could have been continued in the current contract, notwithstanding the changes in the types of courses required for the alternative, also, specified in the MOA for the new agreement. Significant in this regard is the fact that the parties as related above, knew how to specify in the MOA portions from the prior agreements that they wanted to delete, and they did so by specifically detailing sections that would be deleted, that had appeared in the prior agreements. In such circumstances, I again conclude that an ambiguity was created as to whether or not the parties had agreed to delete the electrical engineering clause from the successor agreement, and that for this reason as well, that no meeting of the minds has been established.

I wish to emphasize that I make no findings that Respondent is correct in its assertion that a meeting of the minds has been established that the successor agreement would include all the riders and the electrical engineering degree. Indeed this was the position espoused by Respondent in its charge to the Region, which was dismissed and the appeal denied, alleging that TWC violated Section 8(a)(1) and (5) of the Act, by failing to sign a contract including all of these provisions. I do not and cannot revisit that decision as that issue is not before me. Indeed even if it was, much of my analysis detailed above would equally apply, and I would find no meeting of the minds has been established, due to ambiguities in the MOA as to whether these provisions should or should not be included in the successor contract. *Vallejo Trade Bureau,* supra, at 769.

Accordingly, based on the above analysis and precedent, I find that General Counsel has not met its burden of proof, and that the complaint should be dismissed.

Based on these findings of fact and the entire record I make the following:

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not commit unfair labor practices as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. April 28, 2015

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.